

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 741 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

=====

1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

LEGAL HEIRS OF KURBANHUSSAIN AHMADALI

Versus

SONABHAI BHAIJIBHAI

Appearance:

MR HS MUNSHAW for Petitioners
RULE SERVED for Respondent No. 1
SERVED BY AFFIX.(N) for Respondent No. 2, 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 30/06/2000

CAV JUDGEMENT

The petitioners in this civil revision
application are the original decree holders and the

respondents are the judgement-debtors. The petitioners have preferred this Civil Revision Application under Section 115 of the Civil Procedure Code, 1908, challenging the orders of the Executing Court dated 30.9.1996 and also the order dated 6.4.1998 in Execution Petition No.84 of 1993.

2 It appears from the record that the present petitioners submitted aforesaid Execution Petition before the Executing Court being the Court of the learned Civil Judge (Junior Division) at Devgadhbaria. There the Executing Court passed an order on 17.10.1994 as follows:-

- (i) A junior clerk of the Court be appointed as Commissioner of the Court.
- (ii) The Commissioner should hand over the possession of the land described in the order along with superstructure standing therein to the petitioners.
- (iii) In case the petitioners are not in need of the superstructure then, the superstructure be removed and the possession of the vacant land be handed over to the petitioners.
- (iv) In case the respondents do not hand over vacant possession, then, they should be sent to civil jail for 30 days.
- (v) Arrest warrants be issued against the respondents on payment of appropriate expenses by the petitioners.
- (vi) The petitioners shall deposit the remuneration and expenses of the Commission in a sum of Rs.300.
- (vii) If there is any movable property in the aforesaid land, then a panchnama be prepared in the presence of the panchas and the same may be handed over to the respondents.
- (viii) In case the respondents refuse to receive same, the same be sold by public auction and the proceeds be deposited in the Court.

3. The aforesaid order was issued and accordingly the Commissioner was appointed and Commission was also issued. However, it appears from the record that the Commissioner could not perform his function in time and

therefore there were two applications before the Executing Court. The first one is application dated 27.9.1996. There it has been mentioned by the present petitioners that the Court has passed the order below exh.5 and Appeal from Order No.448 of 1996 has been preferred against the said order. Then in the said matter the petitioners have engaged an advocate and he informed the petitioners on phone that the said matter was fixed for final hearing on 30.9.1996.

4. The application further says that for removal of encroachment over the disputed land it would be necessary to have the police protection. That at present it was not possible to get police protection at village Piplod or at Devgadhbaria and therefore some time is needed for police protection. On the aforesaid two considerations, the petitioners applied for time for about 10 days.

5. There appears to be an application exh.46 submitted by the Court Commissioner dated 30.9.1996. There the Commissioner has stated that he had proceeded on the spot for the execution of the Commission but the decree holder was not informed and therefore he was not present and therefore the matter may be adjourned.

6. Ultimately, the Court did not extend time and passed the order on 30.9.1996 below application exh.1 to the effect that looking into the Commissioner's Report exh.48 it appeared that the decree-holder i.e. the petitioners had not remained present for the execution of the decree and therefore the execution petition is dismissed.

7. Thereafter the present petitioners submitted Civil Misc. Application No.7 of 1996 and prayed that the matter may be restored on file.

8. The Trial Court found that the petitioners were not justified in getting the said prayer and therefore dismissed the said application of the petitioners.

9. Feeling aggrieved by the said orders of the trial Court, the petitioners have preferred this Civil Revision Application before this Court. It has been contended that the Execution Court seriously erred in dismissing the application of the petitioners and therefore the Execution Court has committed serious illegality and injustice is caused to the petitioners and therefore the present Civil Revision Application be allowed. The above said orders of the executing Court be set aside and the appropriate orders be passed by this Court as may be

found just and proper in the present case looking to the facts and circumstances of the case.

10. The Court had issued the notice to the respondents returnable on 3.3.1999. Thereafter the petition was admitted and Rule was issued returnable on 14.3.2000.

11. However, though the first respondent made appearance through an advocate, none appeared to argue the matter on behalf of the respondents.

12. I have heard Mr H.S. Munshaw, learned advocate for the petitioners and perused the papers.

13. From the facts narrated above, it is very clear that though the execution of the Commission has been little delayed, the delay does not appear to be intentional on the part of the petitioners. Naturally, the petitioners were interested in getting the possession of the immovable property in accordance with the decree obtained by them in 1990. However, it seems that some interlocutory orders were passed and they were carried in appeal before this Court. In that view of the matter, when the matter was pending before the High Court, the advocate for the petitioners advised the petitioners to wait till the disposal of the Appeal from Order No.448 of 1997. Therefore, it appears that the petitioners requested for time for the execution of the Commission on the strength of the advice of their advocate. Therefore, it cannot be said that there was negligence or inadvertence or lack of bona fide on the part of the petitioners. In that view of the matter, the trial Court should have considered the said prayer in the aforesaid background which has not been done by the trial court.

14 Without considering the aforesaid aspects of the case, the trial Court had rejected the prayer and dismissed the execution petition. This means that the trial Court had jurisdiction to extend the time and considering the facts and circumstances of the case there were all justification for allowing the application and extending the time. The trial Court has failed in exercising the powers and jurisdiction vested in it.

15 Moreover, since the execution petition has been dismissed, the right of the petitioners has been seriously prejudiced and has been adversely affected. Therefore, orders in question have resulted into failure of justice and miscarriage of justice.

16 In the aforesaid view of the matter, this is a fit case wherein this Court should interfere in this Civil Revision Application. It is more so when the respondent side have not taken pains to appear and contest this Civil Revision Application. It is more so when the notices were initially issued returnable on 3.3.2000 and even the notice of Rule was issued returnable on 14.3.2000.

17 In the aforesaid view of the matter, when the executing court has committed a jurisdictional error and when there is apparent miscarriage of justice, this is a fit case wherein the Court should allow the Revision Application and pass the orders restoring the original position.

18. This Revision Application is therefore allowed. The orders passed by the Executing Court dated 30.9.1996 below the execution petition and also the orders dated 6.4.1998 in Civil Misc. Application No.7 of 1996 are hereby quashed and set aside. The Execution Petition No.84 of 1993 is ordered to be restored. The trial Court shall issue fresh Commission in accordance with the orders passed by the Executing Court on 17.10.1994 for carrying out the functions and duties in terms of the said order. The trial Court shall give a reasonable time to the parties as well as to the Commissioner for executing the Commission.

19. In view of the facts and circumstances of this case, there shall be no order as to costs. Rule is made absolute with no order as to costs.

(mohd)